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Kevin L. Smith

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FRIEDLANDER, Judge

Jeremy Scott Merritt appeals his conviction for Possession of Marijuana,¹ as a class D felony. He presents the following restated issues for review:

1. Did the trial court abuse its discretion by admitting into evidence marijuana that was seized as the result of a warrantless search and seizure during a traffic stop?
2. Did the State present a sufficient chain of custody for the admission of the marijuana evidence at trial?

We affirm.

On the afternoon of May 29, 2007, Officers Matthew Adams and Daniel Cotton of the Sellersburg Police Department were parked near a house/business known for drug activity. They observed a vehicle parked in the driveway of the residence and determined that it was registered to Kristy Merritt, who is the wife of Jeremy Merritt. A white male, later identified as Merritt, drove away in the vehicle. Soon thereafter, the officers initiated a traffic stop of the vehicle when Merritt failed to signal a left turn. Merritt immediately exited the vehicle upon coming to a stop but complied when the officers directed him to get back inside.

Both officers approached, and Officer Cotton requested Merritt's driver's license and the registration for the vehicle. Merritt, who was the only occupant in the vehicle, complied. After the officers returned to their police vehicle to run a computer check, Officer Adams observed Merritt fidgeting and making a lot of movement in the vehicle, bending over, and reaching toward the passenger side. Based on his training and experience, Officer Adams believed Merritt could be trying to reach for or hide a weapon. Officer Adams told Officer

¹ Ind. Code Ann. § 35-48-4-11(1) (West, PREMISE through 2008 2nd Regular Sess.).

Cotton of his observations and directed him to conduct a protective pat-down search of Merritt. While conducting the limited pat-down for weapons, Officer Cotton detected the odor of marijuana on Merritt's person and informed Officer Adams of this. Officer Adams then asked Merritt for consent to search the vehicle, but Merritt refused.

A K-9 unit was called to the scene and arrived shortly thereafter. A certified K-9 conducted a sweep of the exterior of the vehicle and alerted on the driver's side. Officer Matthew Crump then allowed the K-9 into the vehicle, where the dog alerted to something under the driver's seat. Officers then discovered a ripped-open bag of green, leafy vegetation under that seat, and Merritt was placed under arrest for marijuana possession. During a search incident to arrest, Officer Adams found a clear plastic bag in Merritt's pocket that contained a "very small amount" of a substance Officer Adams also believed to be marijuana. *Transcript* at 247.

Officer Adams collected the evidence from the scene and placed the suspected marijuana seized from both locations into the same evidence bag.² At the police station, he field tested and weighed the combined substances. Officer Adams then returned the suspected marijuana to the evidence bag, labeled and sealed the bag, and locked it inside an evidence locker. The next day, Detective Mark Levesque (the detective in charge of the property room) removed the evidence bag from the locker and placed it in storage. The

² Officer Adams testified that the clear plastic bag inside the evidence bag admitted at trial was the bag recovered from Merritt's person but the marijuana inside that plastic bag contained the drugs found from both locations at the scene. He explained:

I believe whenever the K-9 alerted on it underneath the vehicle the bag had gotten ripped and then all the contents was [sic] placed into the evidence bag and at the time that I weighed it everything was put together for a total weight.

evidence remained in storage until Detective Levesque transported it to the Indiana State Police laboratory for testing. There, the evidence was determined to be 24.48 grams of marijuana. After testing, the evidence was returned to Detective Levesque and placed in storage until trial.

The State charged Merritt with possession of marijuana, a class D felony. Merritt eventually filed a motion to suppress the drug evidence, upon which the trial court held a hearing on February 25, 2008. The court took the matter under advisement and then denied the motion to suppress the following day. On February 27, 2008, Merritt was convicted as charged by a jury. He now appeals.

1.

Merritt initially argues that the decision to pat him down for weapons was in violation of the Fourth Amendment to the United States Constitution and article 1, § 11 of the Indiana Constitution.³ Specifically, he claims the pat-down search was not based upon reasonable suspicion that he was armed and dangerous and, therefore, the search was not reasonable.

The standard used to review rulings on the admissibility of evidence is effectively the same whether the challenge is made by a pretrial motion to suppress or by a trial objection. *Burkes v. State*, 842 N.E.2d 426 (Ind. Ct. App. 2006), *trans. denied*. We review for abuse of discretion and reverse only where the decision is clearly against the logic and effect of the facts and circumstances. *Joyner v. State*, 678 N.E.2d 386 (Ind. 1997). We will not reweigh

Transcript at 405.

³ Merritt acknowledges that the initial stop and detention were reasonable and challenges only the pat-down search for weapons, which resulted in the eventual discovery of drugs in the vehicle and on his person.

the evidence, and we consider the conflicting evidence most favorable to the trial court's ruling. *Burkes v. State*, 842 N.E.2d 426. We will, however, also consider any uncontradicted evidence to the contrary. *Id.* We will affirm the decision if it is supported by substantial evidence of probative value. *Id.*

As set forth above, Merritt challenges the admission of the drug evidence on both federal and state constitutional grounds. Although the Fourth Amendment and article 1, section 11 both serve to protect persons from unreasonable searches and seizures, we interpret and apply the provisions independently. *See Taylor v. State*, 842 N.E.2d 327 (Ind. 2006). Therefore, we will address each in turn.

Under the Fourth Amendment, an officer may conduct a limited pat-down search for weapons during a stop if the officer reasonably believes that his safety or that of others may be in danger. *Abel v. State*, 773 N.E.2d 276 (Ind. 2002) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)); *Trigg v. State*, 725 N.E.2d 446 (Ind. Ct. App. 2000). The officer need not be absolutely certain that the individual is armed before performing a pat-down search. *Abel v. State*, 773 N.E.2d 276. Rather, the issue is whether a reasonably prudent person in the same circumstances would be warranted in believing the person's safety or that of others was in danger. *Id.* In determining whether the officer acted reasonably under the circumstances, due weight must be given to "the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Id.* at 279. *See also Pearson v. State*, 870 N.E.2d 1061, 1065 (Ind. Ct. App. 2007) ("we consider whether the facts available to the officer at the moment of the search would warrant a person of reasonable caution in believing the

action taken was appropriate”), *trans. denied*.

In the instant case, Merritt was lawfully stopped for a traffic violation after leaving a residence known for drug activity. Upon being stopped, Merritt initially exited the vehicle he was driving but then complied when the officers ordered him to get back inside. After the officers returned to their police vehicle to check Merritt’s license and registration, Officer Adams observed Merritt fidgeting and moving around a lot inside the vehicle, including bending over and reaching toward the passenger side. In light of his training and experience, Officer Adams believed these actions indicated Merritt could be, among other things, arming himself with a weapon. Therefore, Officer Adams directed Officer Cotton to perform a protective pat-down search of Merritt.

Under the particular circumstances of this case, especially in light of Merritt’s furtive movements inside the vehicle, the officers acted reasonably in conducting a pat-down search of Merritt for weapons.⁴ *See Trigg v. State*, 725 N.E.2d at 449 (holding that protective pat-down was reasonable where officer approached vehicle after traffic stop and defendant became “very nervous and fidgeted in his seat as if trying to hide or retrieve something”). *Cf. Rybolt v. State*, 770 N.E.2d 940, 941 (Ind. Ct. App. 2002) (finding no reasonable suspicion where defendant was asleep when officer approached vehicle and, upon awaking, made “no furtive movements”), *trans. denied*; *Jett v. State*, 716 N.E.2d 69, 71 (Ind. Ct. App. 1999) (finding no reasonable suspicion despite the fact defendant immediately exited his vehicle

⁴ Merritt seems to argue that if the officers were truly concerned for their safety they would have both converged on him with their weapons drawn. We do not agree that such a forceful response by police is necessarily required in order to establish that an officer had an objectively reasonable suspicion that an individual was armed and dangerous.

upon being stopped, because defendant “made no furtive or threatening movements” after reentering his vehicle as directed by police). Therefore, we find no violation of the Fourth Amendment.

Merritt also challenges the pat-down search under the Indiana Constitution. The purpose of article 1, section 11 is to “protect from unreasonable police activity those areas of life that Hoosiers regard as private.” *Taylor v. State*, 842 N.E.2d at 334. In determining whether police behavior was reasonable under section 11, courts “must consider each case on its own facts and construe the constitutional provision liberally so as to guarantee the rights of people against unreasonable searches and seizures.” *Id.* Thus, we evaluate the reasonableness of the police conduct under the totality of the evidence. *Masterson v. State*, 843 N.E.2d 1001 (Ind. Ct. App. 2006), *trans. denied*.

For the reasons set forth above, we conclude that the instant search was also reasonable under article 1, section 11. Most notably, the limited pat-down search was not conducted until after Officer Adams observed Merritt make furtive movements, which caused the officer to become concerned that Merritt could be arming himself. Because Officer Adams reasonably believed Merritt posed a threat to his and Officer Cotton’s safety, the protective pat-down search was reasonable.

2.

As another challenge to the admissibility of the marijuana evidence, Merritt claims the State failed to establish a proper chain of custody. The basis of Merritt’s argument in this regard is that the officers allegedly collected marijuana from two different locations (his

pocket and the vehicle) yet only one evidence bag containing marijuana was submitted to the lab and entered into evidence at trial.

The admission or exclusion of evidence is a matter within the sound discretion of the trial court. *Rolland v. State*, 851 N.E.2d 1042 (Ind. Ct. App. 2006). An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Id.* Further, with regard to chain-of-custody issues, we have set forth the following standard:

Physical evidence is admissible “if the evidence regarding its chain of custody strongly suggests the exact whereabouts of the evidence at all times.” *Culver v. State*, 727 N.E.2d 1062, 1067 (Ind. 2000). In other words, the State must give “reasonable assurances that the property passed through various hands in an undisturbed condition.” *Id.* Because the State need not establish a perfect chain of custody, slight gaps go to the weight, not the admissibility, of the evidence. *Id.* There is a presumption of regularity in the handling of exhibits by public officers. *Murrell v. State*, 747 N.E.2d 567, 572 (Ind. Ct. App. 2001). Thus, merely raising the possibility of tampering is insufficient to make a successful challenge to the chain of custody. *Cockrell v. State*, 743 N.E.2d 799, 809 (Ind. Ct. App. 2001).

Filice v. State, 886 N.E.2d 24, 34 (Ind. Ct. App. 2008), *trans. denied*.

At trial, Officer Merritt testified that he collected a small amount of green, leafy vegetation from Merritt's pocket and a much larger amount from the vehicle and that he placed all of the vegetation into one evidence bag. Moreover, the record establishes that the vegetation found in the vehicle was scattered on the floorboard under the driver's seat, as the plastic bag in which it had been held had been ripped open.⁵ Officer Merritt further testified

⁵ Officer Adams speculated that the bag was ripped by the K-9 when it alerted on the drugs. It is also possible that the bag was ripped when Merritt furiously attempted to hide it under the seat during the stop. Knowing precisely how the bag was ripped, however, is not important to the issue at hand.

that he discarded the ripped plastic bag at the police station when he weighed and field tested the vegetation.

While the instant case certainly exhibits inadvisable police work with respect to collecting two separate quantities of marijuana into one evidence bag, Merritt has not established a problem regarding the chain of custody of said evidence. On the contrary, the State established the whereabouts of the evidence collected at the scene from the time it was collected until the time of trial. There is no indication that the marijuana admitted at trial was anything but the same evidence collected at the scene. Moreover, our review of Merritt's appellate argument on this issue reveals that he is simply attacking the credibility of the testifying officers, particularly Officer Adams.⁶ These arguments were made to the jury and rejected by the jury. The marijuana evidence was properly admitted by the trial court.

Judgment affirmed.

MAY, J., and BRADFORD, J., concur.

⁶ For example, Merritt insinuates that no marijuana was actually found on his person and that Officer Adams simply fabricated this after the fact. Moreover, Merritt points to inconsistencies regarding whether the bag of marijuana found under the driver's seat was actually ripped with vegetation spilling out onto the floorboard. Merritt points to "other irregularities in the testimony of Officer Adams" and further states, "the testimony of Officers Adams and Crump almost suggests they were talking about two different events." *Appellant's Brief* at 25.